

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



# 74-1463

To be argued by  
WALTER J. HIGGINS, JR.

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1463

CALVIN WILLIAMS,

*Petitioner-Appellant,*

—v.—

UNITED STATES OF AMERICA,

*Appellee*

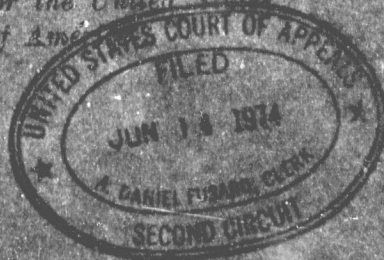
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

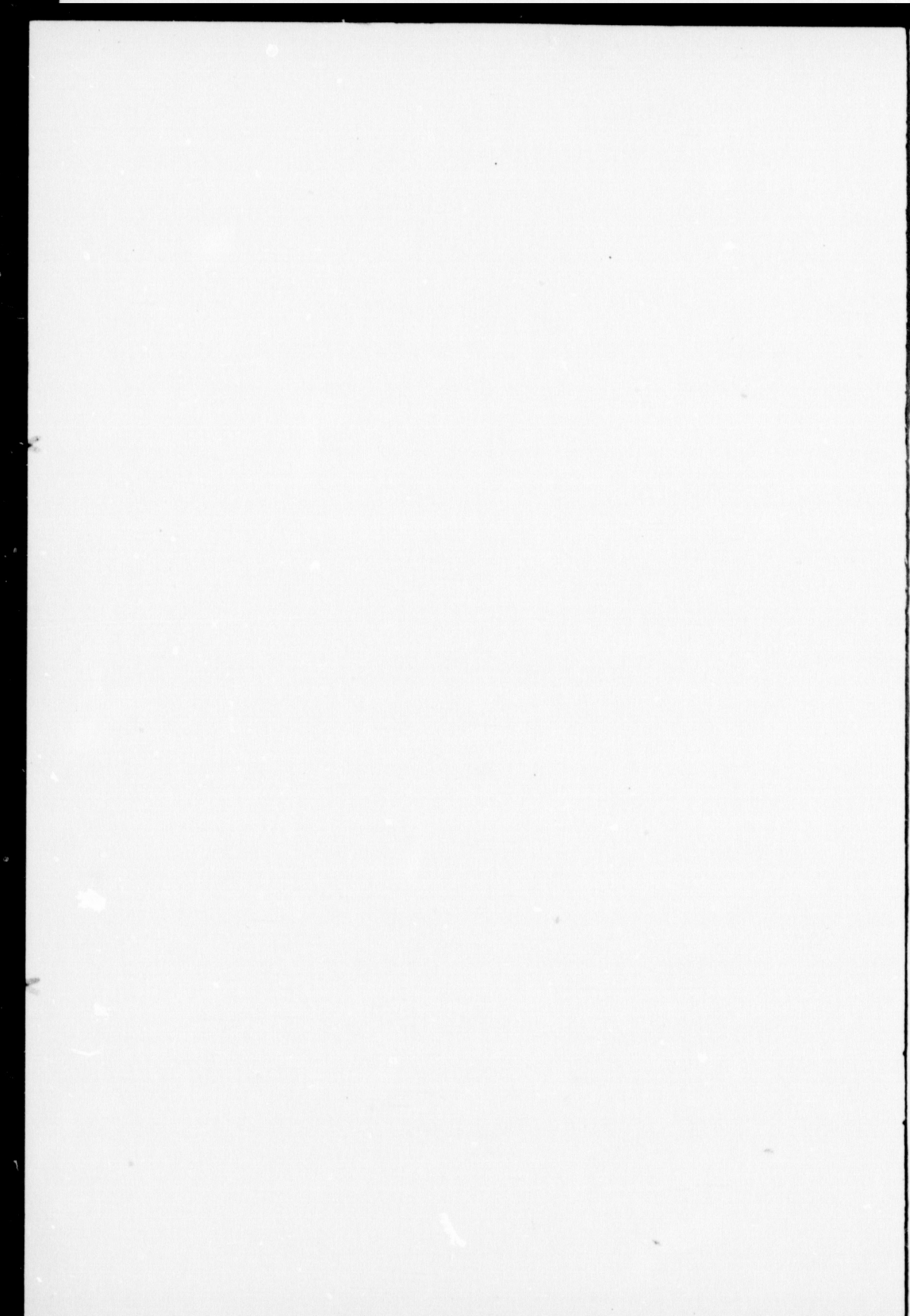
### BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,

United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America

WALTER J. HIGGINS, JR.,  
JOHN D. GORDAN III,  
Assistant United States Attorneys,  
Of Counsel.







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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement •**

Calvin Williams appeals from an order of the Honorable Edmund L. Palmieri, United States District Judge for the Southern District of New York, filed February 26, 1974, denying Williams' petition under Title 28, United States Code, Section 2255, to set aside his conviction.

Indictment 71 Cr. 831, filed August 3, 1971, charged Williams and four others, Richard English, Lolita Kowlessar, Connie McNeil and Robert Roseboro, with transferring narcotics other than pursuant to a written order form and conspiracy so to do, in violation of Sections 4705(a) and 7237(b) of Title 26, United States Code. Count One charged all five defendants with conspiracy, while Counts Two, Three and Four charged English and Roseboro only with substantive violations of the order form statute.

Trial of Williams, Kowlessar, and McNeil \* on the conspiracy count commenced on November 30, 1971. On December 8, 1971, the jury found Williams guilty and acquitted McNeil and Kowlessar. On January 27, 1972, Judge Palmieri sentenced Williams to eight years imprisonment. He is presently serving this sentence.

On May 15, 1972, the United States Court of Appeals for the Second Circuit affirmed Williams' conviction from the bench. 458 F.2d 1406. The United States Supreme Court denied Williams' petition for writ of certiorari on October 10, 1972. 409 U.S. 875.

On June 28, 1973 Judge Palmieri denied without a hearing Williams' petition to set aside his conviction pursuant to Title 28, United States Code, Section 2255. By order filed February 26, 1974, Judge Palmieri, after granting a motion for reconsideration of Williams' motion pursuant to Section 2255 again denied the motion without a hearing.

## **Statement of Facts**

### **I. The Government's Case at Trial.**

At trial, the Government's proof overwhelmingly established an elaborate narcotics network in which defendant Calvin Williams was a supplier, defendant Robert Roseboro was his wholesaler-retailer, defendant Richard English was Roseboro's courier, and "Bobby", an informant, was the "purchaser". Special Agent Allen Johnson of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, played the role of "Bobby's" representative or "man".

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\* On November 30, 1971, prior to trial, Roseboro entered a plea of guilty to all counts in the indictment. On January 31, 1972, he was sentenced to fifteen years imprisonment and was immediately remanded to the custody of the Attorney General. On October 12, 1972, Roseboro's sentence was reduced to five years imprisonment. English was a fugitive at the time of trial.



On October 19, 1970, Agent Johnson, who was assigned to the New Orleans office of the Bureau of Narcotics and Dangerous Drugs, checked into the Sheraton-Holiday Inn in Manhattan where he was introduced to Richard English by "Bobby" who had accompanied him from New Orleans. All three went to Robert Roseboro's house in the Bronx where Agent Johnson was introduced to Roseboro. While driving around New York that night, "Bobby", in Roseboro's presence, handed Agent Johnson a brown bag containing approximately 210 grams of heroin hydrochloride and 108 grams of cocaine hydrochloride. These narcotics were presumably paid for with \$10,000 in cash which had been given to "Bobby" earlier by Agent Johnson (Tr. 65-71, 75-77).\*

On October 28, 1970, Agent Johnson returned to New York, checked in at the Sheraton Motor Inn in Manhattan and met Roseboro in his hotel room. At this time, Agent Johnson gave Roseboro \$10,000.00 in cash, and Roseboro stated that the package would be delivered later that afternoon. The following day, English delivered to Agent Johnson at his hotel room a plastic bag containing heroin and instructed Agent Johnson to "tell the man in New Orleans that Rosie says he owes \$2,500.00 more" (Tr. 78-90, 546; GX 5C, 5E).

In November, 1970, based on the above purchases of narcotics by Agent Johnson, a court authorized federal wiretap was installed on Roseboro's telephone at his home in the Bronx (Tr. 162-165). On the evening of December 5, 1970, Roseboro placed a telephone call to a "Calvin" at a public telephone located in the Glamour Inn at 2130 Seventh Avenue in Manhattan. During this conversation (GX 3J4), Roseboro placed an order for several "pounds" of "wine" and "whiskey" and "Calvin" agreed to deliver a "pound of wine" the following evening at 8:00 P.M. (Tr. 144-47, 219-21).

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\* References to "Tr." are to the stenographic transcript of proceedings and to "GX" are to Government exhibits in evidence.

The next day, December 6th, English left Roseboro's residence in the Bronx at about 7:30 P.M. and drove to the Glamour Inn, where he met with Calvin Williams at about 7:50 P.M. After what appeared to be a heated conversation with Williams, English left the Glamour Inn and returned directly to Roseboro's residence. Later on the same evening, Roseboro telephoned "Calvin" at the Glamour Inn and before he had a chance to complain that all he had received was a sample, "Calvin" agreed to take "it" back and give him possibly two or three "pounds" the following evening at 7:00 P.M. (Tr. 166-74, 517,18; GX 3K4).

On December 7, 1970, at 7:00 P.M., English met Calvin Williams and an unidentified male in front of the Glamour Inn. After a short conversation, English and the unidentified male proceeded to 128th Street and Fifth Avenue where English parked his car, and his passenger left the area. English waited at his car for approximately twenty-five minutes before returning alone to the Glamour Inn, English was observed running out of the bar, jumping in his car and driving at a high rate of speed to Roseboro's residence in the Bronx. Minutes later, Roseboro telephoned "Calvin" at the Glamour Inn inquiring as to what had happened. "Calvin" responded that Roseboro's "man" had been "trailed" so there was nothing he ("Calvin") could do that night (Tr. 176-79, 183-84, 519-20; GX 3L4).

On December 10, 1970, Roseboro received a telephone call from "Bobby" in New Orleans and was informed that "Al" (Agent Johnson) would be coming to New York the following day to purchase \$10,000 worth of narcotics. At the conclusion of this conversation, Roseboro immediately telephoned "Calvin" at the Glamour Inn and ordered "one quarter", meaning one-quarter of a kilogram of narcotics, which Roseboro claimed was due him from a previous transaction. "Calvin" instructed Roseboro to check with him the following night at 3:00 P.M. (Tr. 237, 238; GX 3Q6).



On December 11, Agent Johnson checked in at the Sheraton Motor Inn in Manhattan, where he received a telephone call from Roseboro telling him that "Richard" would be there later to pick up the money. Roseboro then called "Calvin", who, over Roseboro's protestations, told him that he didn't have "it" yet and probably wouldn't get "it" until later that evening at about 10:00 or 11:00 P.M. (GX 3R4). At approximately 10:00 P.M. on the same evening, Roseboro and English went to the Glamour Inn where Roseboro entered the bar alone and exited a few minutes later in the company of Calvin Williams with whom he had a short conversation. Williams thereupon re-entered the Glamour Inn and Roseboro and English drove off. Approximately one hour later, English arrived at Agent Johnson's hotel room where he was given \$10,000 in cash by Agent Johnson. English then left the hotel and met with Roseboro a few blocks away (Tr. 90-93, 199-202, 239-40).

On December 15, 1970, English delivered to Agent Johnson at the Sheraton Inn approximately 429.9 grams of heroin hydrochloride and 11.53 grams of cocaine hydrochloride (Tr. 93-98, 543-55; GX 6C and 7C).

## **II. The Application Pursuant to Title 28, United States Code, Section 2255.**

In April 1973, Williams moved to set aside his conviction pursuant to Title 28, United States Code, Section 2255 on the ground that co-defendant Robert Roseboro, who pleaded guilty to all four counts of Indictment 71 Cr. 831 prior to Williams' trial, subsequently testified in the trial of *United States v. Manfredi, et al.*, 72 Cr. 810, in the United States District Court for the Southern District of New York, in a manner exculpatory of Williams. Specifically, Williams in an affidavit sworn to March 19, 1973, protested his innocence and claimed Roseboro had testified in the *United States v. Manfredi* trial that Williams was not involved in the case for which he was convicted. In support of the

motion Irving Anolik, Esq., Williams' attorney, submitted a statement, dated April 12, 1973, quoting a portion of Roseboro's testimony in the *United States v. Manfredi* trial in which Roseboro testified that the narcotics he had sold to Agent Johnson on December 15, 1970, were in fact obtained not from Williams but from one Joey LaCosa,\* and that he had so told the Government (See Appellant's Appendix [hereafter "App."] 8a-10a).

### **III. The Government's Opposition to the Appellant's Section 2255 Petition.**

Affidavits of Assistant United States Attorney Walter J. Higgins, Jr., and Robert Roseboro, sworn to June 14, 1973, were submitted in opposition to the motion Williams' Section 2255 petition (App. 12a-20a). The Higgins affidavit contained a clear review of the court files and records bearing on the evidence presented against Williams and consented to a hearing on the issue of whether the Government had deliberately suppressed exculpatory evidence. The Roseboro affidavit stated that in August, 1972, he *first* told Government agents that Williams was not the source of the third sale narcotics to Agent Johnson on December 15, 1970. The Roseboro affidavit further stated that Williams was the source of the first and second sale of narcotics to Agent Johnson on October 19 and 28, 1970. Finally, Roseboro said that although the heroin sold on December 15th was from Joey LaCosa, he had first contacted Williams twice in an effort to procure the narcotics for Johnson.

The petition was denied by order of Judge Palmieri filed June 28, 1973 (App. 21a).

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\* LaCosa was a defendant in the *Manfredi* case. See *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3667 (June 3, 1974).

#### **IV. The Application for Reconsideration of Appellant's Request for a Hearing Pursuant to Title 28, United States Code, Section 2255.**

Williams petitioned for reconsideration of his Section 2255 motion for an evidentiary hearing on the basis that the original petition was denied without a hearing in spite of the fact that the Government consented to such a hearing. On February 26, 1974, Judge Palmieri granted the motion for reconsideration and again denied Williams' petition without a hearing, again on the grounds that the averments in support of the petition were insufficient (App. 22a). From the latter order this appeal is taken.

### **A R G U M E N T**

#### **The District Court Properly Denied Williams' Petition Without a Hearing.**

Williams' claim for relief is based solely on the testimony of Williams' co-defendant, Robert Roseboro, at the later trial of *United States v. Manfredi, et al.*, 72 Cr. 810, which was that Williams had not supplied the narcotics delivered to Agent Johnson on December 15, 1970, and that Roseboro had told that to the Government "[o]n a few occasions." \* From this testimony Williams speculates that "[i]f the

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\* The portion of Roseboro's testimony on cross-examination which is found at pages 433-434 of *Manfredi* transcript, is as follows:

"Q. Isn't it a fact that you told the Government that these young ladies and the other people were involved in . . . [the December 15, 1970 delivery of heroin]? A. No, I didn't.

Q. Did you tell them they were not involved? A. On a few occasions I told them they wasn't involved.

Q. They were not involved? A. Right.

Q. You told them nobody else was involved except yourself? A. Yes.

Q. Is that the truth? A. To my knowledge, yes."

Government at that time had been aware that he would testify the way he testified at the MANFREDI case, then, of course, that fact should have been made known under *BRADY v. MARYLAND*, 373 U.S. 83, because it would have been highly exculpatory." (Brief at 3). Accordingly, Williams reasons that he is entitled to a hearing on the matter, presumably to establish when it was that the Government learned that Williams had not been the source of the narcotics delivered on December 15, 1970, and that Judge Palmieri erred in denying him such a hearing, particularly since the Government had consented to it.

Implicit in the arguments Williams, makes, although nowhere clearly expressed, is the notion that if he can establish that the Government knew at the time of his trial that Williams was not the source of the narcotics English delivered to Agent Johnson on December 15 pursuant to the informant's arrangement with Roseboro, then he is entitled to have his conviction set aside under *Brady v. Maryland*, *supra*. While this Court need not reach that question, it is clear that Williams' proposition is not correct. First, there can be no question that Williams knew at the time of his trial that he was not the supplier of the narcotics delivered December 15. As a result, the Government had no obligation under *Brady* to furnish him with that information. *United States v. Purin*, 486 F.2d 1363, 1368 n.2 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3666 (June 3, 1974); *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). Moreover, since Williams knew that Roseboro had pleaded guilty to all of the counts of the indictment at the opening of Williams' trial and that he had not been called as a Government witness against Williams, Williams could have subpoenaed Roseboro to testify for the defense.\* *Cf. United*

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\* It appears to be an open question in this Circuit whether, if Roseboro had been called as a witness, his guilty plea to all the counts of the indictment would have precluded an assertion of a

[Footnote continued on following page]



*States v. Pollak*, 474 F.2d 828, 832 (2d Cir. 1973). For that matter, Williams could himself have taken the stand and denied furnishing the narcotics delivered on December 15. Finally, it should be noted that at Williams' trial the Government never argued in summation that Williams had been the source of the narcotics delivered on December 15, and it is clear that the evidence of the delivery of the narcotics by English on December 15 pursuant to the arrangement the informant had made with Roseboro was admissible against Williams, even though Williams had not provided the narcotics, in view of the proof that Williams was engaged in an ongoing narcotics distribution partnership with Roseboro and English and had in fact been sought out by Roseboro to furnish the narcotics for this very delivery. *United States v. Salazar*, 485 F.2d 1272, 1276-1277 (2d Cir. 1973); *United States v. Tramaglino*, 197 F.2d 928 (2d Cir.), cert. denied, 344 U.S. 864 (1952).

Judge Palmieri did not reach the question just discussed and properly denied the motion without a hearing because the affidavits supporting the petition were insufficient and because Roseboro's testimony at the *Manfredi* trial in no way impeached the jury's verdict at Williams' trial. Section 2255 requires a hearing to resolve disputed issues of fact "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Fontaine v. United States*, 411 U.S. 213, 215 (1973). In this case there were no disputed issues of fact, and the facts presented in Williams' affidavits supporting his motion fail to show he is entitled to the relief demanded. See *Dalli v.*

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Fifth Amendment privilege against testifying about the crimes charged. Compare *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 864 (1972), with *United States v. Wilson*, 488 F.2d 1231, 1233 n. 3 (2d Cir. 1973), cert. granted, 42 U.S.L.W. 3631 (May 13, 1974). There can be little doubt that Judge Palmieri would have required Roseboro to testify if called. See *United States v. Sclafani*, 487 F.2d 245, 252 (2d Cir.), cert. denied, 414 U.S. 1023 (1973).

*United States*, 491 F.2d 758 (2d Cir. 1974). The affidavits in support of the application below, which depend completely on Roseboro's testimony at the *Manfredi* trial, do not allege, far less support, a claim that the Government possessed evidence exculpating Williams *at the time of his trial*, if indeed Roseboro's testimony can be deemed to be of that nature. Roseboro only testified in the *Manfredi* case that he told the Government "on a few occasions" that nobody else was involved "in that crime" [i.e. the third delivery of narcotics on December 15th]. Nothing Roseboro said in the *Manfredi* trial fixes when those "few occasions" were. The affidavit of Roseboro submitted by the Government in opposition to the § 2255 motion clearly indicates that the Government had not been given the information contained in Roseboro's testimony in *Manfredi* until well after Williams' trial.\*

Finally, as Judge Palmieri correctly found, the fact LaCosa, rather than Williams, furnished the narcotics delivered on December 15 in no way suggests that Williams was not guilty of the crime charged. The outcome of the case in no way depended on whether Williams furnished these narcotics, for he was charged only with conspiracy, and the strong proof against him consisted of his own conversations and meetings with Roseboro and English. A review of Roseboro's testimony in *Manfredi* and the proof set forth at Williams' trial clearly establishes that Roseboro did not testify in a manner inconsistent with the Govern-

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\* While the opposing affidavits from the Government cannot be deemed part of the records and files of a case for the purpose of showing that the petitioner is entitled to no relief under 28 U.S.C. § 2255, they may be considered in assessing the sufficiency of the petitioner's supporting allegation. See *Dalli v. United States*, *supra*, 491 F.2d at 762 n. 4. In this case, the Government's opposing affidavits clarify the ambiguity inherent in petitioner's affidavit and thus indicate that the allegations contained in petitioner's affidavit are insufficient to require an evidentiary hearing. Accordingly, Judge Palmieri properly took this into account in his denial of the motion.



ment's proof in the Williams' trial. At that trial, in addition to proving earlier narcotics discussions and meetings involving Williams, the Government established that Williams was the first person Roseboro contacted regarding the purchase of narcotics after the informant, "Bobby", placed his third order for a half kilogram on December 10th. Thereafter, the evidence showed another contact between Williams and Roseboro before the delivery of the one-half kilogram on December 15th. In addition, as already noted, the Government did not argue to the jury that one-half kilogram was obtained from Williams, and whether he did or not made little difference to his guilt. Cf. *United States v. Floyd*, Dkt. No. 73-1957 (2d Cir., April 25, 1974, slip op. at 3031).

Where there is nothing in the record to lend support to a claim of the existence of exculpatory evidence, let alone the Government's knowledge and withholding of such evidence, denial of a motion for post-conviction relief without a hearing is entirely proper. Cf. *Saville v. United States*, 451 F.2d 649, 651 (1st Cir. 1971); *Green v. United States*, 313 F.2d 6, 9 (1st Cir.), cert. dismissed, 372 U.S. 951 (1963). The evidence presented by Williams simply does not support the allegation that the exculpatory evidence was available to the Government at the time of trial, if it in fact was exculpatory at all; therefore, Judge Palmieri correctly denied Williams' motion for post-conviction relief without a hearing.\*

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\* When the original § 2255 motion was made by Williams, the Government consented to an evidentiary hearing so it could rebut the very serious charges made by appellant and clearly demonstrate that it had not overreached in any way in prosecuting the Williams case. Its consent was not an indication that the Government felt there was any merit to Williams' claim. In any case, whether the Government consents to a motion would seem irrelevant when the Court determines that such a hearing is not necessary.

**CONCLUSION**

**The order of the District Court should be affirmed.**

Respectfully submitted,

PAUL J. CURRAN,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

WALTER J. HIGGINS, JR.,  
JOHN D. GORDAN III,  
*Assistant United States Attorneys,  
Of Counsel.*

### AFFIDAVIT OF MAILING